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CITATIONS

548987—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 315

NAT ROGAN, AS UNITED STATES COLLECTOR OF INTERNAL REVENUE AT LOS ANGELES, CALIFORNIA, PETITIONER

v.

SAMSON TIRE & RUBBER CORPORATION, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above cause, reversing the judgment of the District Court of the United States for the Southern District of California.

OPINION BELOW

The District Court's findings of fact and conclusions of law (R. 40–93) are unreported. The

opinion of the Circuit Court of Appeals (R. 1073–1079) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 1, 1943 (R. 1080). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Section 602 of the Revenue Act of 1932, enacted June 6, 1932, imposed an excise tax upon the sale of rubber tires by the manufacturer, but, pursuant to Section 629, the tax was not to become effective until June 21, 1932. The respondent taxpayer, a subsidiary of the United States Rubber Company, had on hand a large quantity of tires which it had manufactured and which, if it should sell them after June 21, 1932, would be subject to tax. By contract executed June 15, 1932, "as of June 1, 1932", for the purpose of avoiding the tax, it purported to "sell" its entire inventory to United States Rubber Products, Incorporated, a wholly owned subsidiary of the United States Rubber Company, and the Products Company, in turn, sold the tires to the trade after June 21, 1932. The question presented is whether the interposition of the Products Company was effective to relieve respondent of the tax.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 602. TAX ON TIRES AND INNER TUBES.[1]
>
> There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:
>
> (1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.
>
> (2) Inner tubes (for tires) wholly in part of rubber, 4 cents a pound on total weight, to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

STATEMENT

On June 1, 1932, the taxpayer and the United States Rubber Products, Incorporated, were subsidiaries of the United States Rubber Company. (R. 43, 44.)

The taxpayer was a Delaware corporation which had been, since 1928, manufacturing and selling tires, tubes, and accessories. (R. 40.) On June 1, 1932, out of 165,010 shares of the taxpayer's common (voting) stock outstanding, 160,185 shares

[1] Section 629 provided that the title containing Section 602 "shall take effect on the fifteenth day after the enactment of tihs Act." Accordingly, since the 1932 Act was enacted June 6, 1932, the effective date of the tax was June 21, 1932.

were held by Samson Corporation, all of whose voting stock was owned by Meyer Rubber Company, which was in turn wholly owned by United States Rubber Company, 310 shares were owned by Meyer Rubber Company, and 4,515 by various persons. Out of 80,000 shares of the taxpayer's convertible preferred stock outstanding, 59,929 shares were owned by Samson Corporation, 20,000 by Meyer Rubber Company, and 71 by various persons; 5,769 outstanding shares of taxpayer's nonconvertible preferred stock were owned by various persons. (R. 43.)

United States Rubber Products, Incorporated, was a wholly owned subsidiary of United States Rubber Company, distributing the latter's products to the public. (R. 42.)

United States Rubber Company was a New Jersey corporation, engaged directly or indirectly in the manufacture and sale of tires, tubes, and other rubber products. (R. 42.)

Prior to June 1, 1932, the taxpayer had been marketing its production through United States Rubber Company under a contract of January 1, 1931. Under this contract, the taxpayer supplied United States Rubber Company with all the tires, tubes, and accessories called for by the United States Rubber Company and bearing the brands specified by the United States Rubber Company and made deliveries of such products to the United States Rubber Company and its branches on consignment, the United States Rubber Company thus acting in effect as the taxpayer's selling agent.

This took the greater part but not all of the taxpayer's production, the taxpayer continuing to supply its own customers. Under this contract, the taxpayer received the price at which the products were sold by United States Rubber Company and bore the manufacturing and selling costs. (R. 44–54, 380–417.)

As of June 1, 1932, the taxpayer and United States Rubber Products, Incorporated, entered into a contract (which was not executed and acknowledged until June 15th and June 13th, 1932, respectively), whereby the taxpayer "sold" to Rubber Products all the tires, tubes, and accessories which the taxpayer had then on hand and all of the same articles which should be manufactured or acquired by the taxpayer thereafter. (R. 10, 55.) Under this contract, the merchandise on hand was to become the property of Rubber Products at once, and that to be manufactured was to become its property as and when the articles were manufactured or acquired by the taxpayer. (R. 11–12.) The price to be received by the taxpayer was cost of manufacture or acquisition plus five percent. (R. 12.) The agreement was to continue until terminated by thirty days' notice in writing. (R. 13.) As of June 1, 1932, a contract was entered into between the United States Rubber Company and United States Rubber Products, Incorporated, its wholly owned subsidiary, which was identical in terms with the contract of the same date between the taxpayer and Rubber Products. (R. 56–57.)

As of June 1, 1932, the United States Rubber Company, United States Rubber Products, Incorporated, Samson Corporation, and the taxpayer all had interlocking officers and directors. F. B. Davis, Jr., was chairman of the board and a director of the taxpayer corporation, president of Samson Corporation, president of Rubber Products and chairman of the board of the Rubber Company. (R. 60–62.)

As of June 21, 1932, a contract was entered into between the taxpayer and United States Rubber Products, Incorporated, whereby the contract of June 1, 1932, was cancelled and the taxpayer agreed to consign its tires, tubes, etc., to Rubber Products, title to the merchandise to continue in the taxpayer until the goods were sold by Rubber Products, when the title to the proceeds from the sale would be in the taxpayer until Rubber Products paid the taxpayer. (R. 57–59.)

As of June 21, 1932, an identical contract was entered into between the United States Rubber Company and its wholly owned subsidiary, United States Rubber Products, Incorporated. (R. 59.)

The District Court found that the motive in carrying out the transfer of June 1, 1932, was to avoid the payment of the tax; that the transfer served no business purpose; that at all times the United States Rubber Company exercised complete control by stock ownership of the policies, affairs, and transactions of the taxpayer and of Rubber Products; that the taxpayer was operated

in effect and practice as a division of the United States Rubber system; that the transfer was dictated and arranged by the United States Rubber Company; that the transfer was not valid or *bona fide* for federal excise tax purposes; and that after the transfer, the taxpayer, for federal excise tax purposes, was still the owner of the inventory purportedly transferred. (R. 89–90.)

The Commissioner of Internal Revenue had determined that the purported sale of June 1, 1932, was ineffective to transfer the taxable articles from the taxpayer to Rubber Products, and that the taxpayer remained the owner of the articles for the purpose of the excise tax, and had determined and assessed against the taxpayer on the sales of the taxable articles after June 21, 1932, the effective date of the tax, excise taxes in the amount of $39,940.45, with interest of $16,215.45, making a total of $56,155.90, which the taxpayer paid. (R. 28.) The taxpayer filed a timely claim for refund of the amount, and upon the rejection of the claim by the Commissioner brought this action against the Collector to recover the amount. (R. 9, 10, 28.) The District Court entered judgment for the defendant and this judgment was reversed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In setting aside the finding of the District

Court that no business purpose was served by the transfer, and in holding that the evidence showed that the agreement had a business purpose.

2. In rejecting the finding of the District Court that the taxpayer was a mere instrumentality of the United States Rubber Company and that the taxpayer was operated as a division of the United States Rubber system.

3. In holding that the principles announced in such cases as *Griffiths* v. *Commissioner,* 308 U. S. 355; *Higgins* v. *Smith,* 308 U. S. 473; and *Continental Oil Co.* v. *Jones,* 113 F. 2d 557 (C. C. A. 10th), are inapplicable where minority stockholders are involved.

4. In holding that the agreement of June 1, 1932, was valid and effective to transfer the property in the taxable articles for purposes of the Revenue Act.

5. In holding that the excise tax imposed by Section 602 of the Revenue Act of 1932 was not imposed with respect to the tires and tubes described in the agreement.

6. In holding that the $56,155.90 collected from the taxpayer was illegally collected and should be refunded.

7. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is in conflict with *Continental Oil Co.* v. *Jones,* 113

F. 2d 557 (C. C. A. 10th). There it was held that purported sales made by a corporation to its wholly owned subsidiaries just prior to the effective date of the tax imposed on gasoline and lubricating oil by Sections 601 (c) and 617 (a) of the Revenue Act of 1932 were not effective for the purpose of avoiding the excise tax which was applicable to the sales of such oil and gasoline by the manufacturer or producer after the effective date of the tax. There is no realistic distinction between a transfer from one subsidiary to another subsidiary of the same parent, as in the present case, and a transfer from a parent to a subsidiary, as in the *Continental* case. The control of the taxable articles is no more changed in the former case than in the latter. Nor does the fact that there were minority stockholders in the instant case serve as a real distinction so long as there is complete and unquestioned control of the corporations involved. The interests of the minority were not antagonistic to the parent corporation to the extent that these transactions were involved, for any taxes that could be eliminated would benefit both. The result herein is therefore in substantial conflict with the *Continental Oil Co.* case.

2. The Circuit Court of Appeals was not justified in setting aside the District Court's finding that no business purpose was served by the transfer. There is ample evidence to support that finding and the contrary conclusion of the Circuit Court of Appeals completely ignores the fact that

the record is barren of any evidence showing any purpose other than tax avoidance for the interposition of the other subsidiary.

3. The decision below is based upon insubstantial distinctions which jeopardize the effective application of a principle which is necessary to safeguard the revenue. The decision of the Circuit Court of Appeals is contrary to the principles approved by this Court in *Griffiths* v. *Commissioner,* 308 U. S. 355, and *Higgins* v. *Smith,* 308 U. S. 473, where the Court refused to recognize as effective for tax purposes transfers of property by taxpayers to their wholly owned corporations, there being no real change in the control of the property.

CONCLUSION

It is therefore respectfully submitted that this petition should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

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Supreme Court of the United States

October Term, 1943.

No. 315.

NAT ROGAN, as United States Collector of Internal Revenue at Los Angeles, California,

Petitioner,

vs.

SAMSON TIRE & RUBBER CORPORATION, a Corporation,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

PAUL H. ARTHUR,
of New York,
Rockefeller Center, 1230 6th Ave., New York,
Attorney for Respondent.

Of Counsel:

ERNEST S. WILLIAMS,
of Los Angeles.

Parker & Baird Company, Law Printers, Los Angeles

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

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(Emphasis indicated by italics herein is added.)

OPINION BELOW.

The District Court in deciding the case rendered or filed no opinion other than that judgment was for the defendant and against the plaintiff. (R. 39.)

The opinion of the Circuit Court of Appeals is reported at 136 F. 2d 345.

GROUNDS.

There are no special or important reasons existing in this case for a writ of certiorari. This case turns and was decided in the court below (C. C. A.) on *factual* issues pertaining exclusively to this case and arising out of facts peculiar to the respondent (original plaintiff).

Therefore, the decision of the Circuit Court of Appeals does *not:*

—conflict with the decision of any other circuit court of appeals;

—decide any question of local law in conflict with applicable local decisions, but *per contra* that decision is in accord with all California statutes and appellate decisions;

—decide any question of federal law which should be settled by this Court;

—decide a federal question in conflict with applicable decisions of this Court;

—depart from or sanction any departure from the accepted or usual course of judicial proceedings.

A brief statement of the facts including a short recital of the history of the Samson Tire & Rubber Corporation will bear out the above.

QUESTION.

Is the Samson Tire & Rubber Corporation a mere figment, or is it a substantial corporation and entitled to have its corporate entity and its corporate acts duly regarded and *not* held for naught?

STATEMENT.

The Samson tire and rubber business was organized at Los Angeles as an integral and independent enterprise in 1917. At that time a corporation known as Samson Tire *and* Rubber Corporation was organized under the laws of Delaware. (R. 102-3.) It sold its shares of stock, which were widely bought by the investing public, and established its factory at Compton in Los Angeles County.

Mr. A. Schleicher was the founder of the business and the organizer and the president of the corporation. Under his executive management the corporation entered into business and successfully conducted that business. (R. 106-8.) In 1928 the business was flourishing and it was decided to expand materially and in this connection to build a large new factory and plant modern in every respect to be located at Los Angeles. To accomplish this expansion program a new corporation known as the Samson Tire & Rubber Corporation (note that the form of the conjunction distinguishes the new from the old corporation, being *"and"* in the old corporate name and *"&"* in the new corporate name) was organized under the laws of Delaware. This new corporation had a large capitalization providing for both common and preferred shares, and for an issue of debentures in the authorized amount of $1,000,000.00. (R. 109-114; 156-166.) The assets, business and good will of the old corporation were transferred to the new corporation for shares of stock of the latter which shares were issued to the old corporation and by it in turn exchanged with its own stockholders for their shares of stock in the old corporation. The new corporation also assumed the liabilities of the old corporation. (R. 122-130.) In addition the new corporation sold and issued to the general investing public debentures in the amount of $1,000,000.00, and also shares of preferred and common stock. (R. 196-8.) By March, 1929, the new corporation had outstanding 165,010 shares of common stock of no par value, of which 100,000 shares had been issued for the assets of the old corporation, 5649 shares of preferred stock of the par value of $10.00 per share and $1,000,000.00 in debentures. (R. 180-2; 183-4; 185.)

The new corporation built at Los Angeles a large modern factory and administration building, and it continued in the operation of the business of manufacturing and selling tires and tubes, originally started in 1917. Mr. A. Schleicher was the president of the new corporation, and the business continued under his executive management. He was the individual responsible for its promotion and operation including this reorganization of 1928. (R. 114.)

Matters continued until the fall of 1930, when commencing in September communications were initiated between Mr. Schleicher representing the Samson Tire & Rubber Corporation and Mr. F. B. Davis, Jr., the president of and representing the United States Rubber Company wherein it was proposed that an offer should be made to the holders of the common stock (which was the voting stock) of the Samson Tire & Rubber Corporation to exchange their holdings of those common shares for shares of preferred stock and shares of Class B common stock of a new company to be organized in Delaware, subject to the approval of counsel for the United States Rubber Company and of counsel for the Samson Tire & Rubber Corporation, and that the United States Rubber Company should have the Samson Tire & Rubber Corporation manufacture in its plant at Los Angeles the tires and tubes to meet all of the requirements of the tire business of the United States Rubber Company and its subsidiaries on the Pacific Coast. It was anticipated that this large additional volume of production would cause the new factory of the Samson Tire & Rubber Corporation to operate at capacity and increase its manufacturing activities to a maximum, greatly to the advantage of the Samson Tire & Rubber Corporation, its debenture holders

and shareholders. The Samson Tire & Rubber Corporation was to continue to manufacture tires and tubes and to conduct its business under its present management. The proposals embraced other features, such as the purchase by the new company to be organized of 60,000 shares of the preferred stock of the Samson Tire & Rubber Corporation of the par value of $10.00 per share, theretofore unissued, for $600,000.00, which would enable the Samson Tire & Rubber Corporation to retire current bank loans, and such as the purchase by the United States Rubber Company or its nominee for $600,000.00 of 120,000 shares of the no par Class A common stock (which was the voting stock) of the new Delaware company to be organized and 50,000 shares of that new company's no par Class B common stock, and such as the guaranty by the United States Rubber Company for a period of five years of dividends at not exceeding 5% per annum on the preferred stock of the new Delaware company. The 50,000 shares of Class B common stock of the new Delaware company to be issued as aforesaid to the United States Rubber Company or its nominee were to be transferred to a trust for a profit sharing plan to be worked out for the benefit of the employees of the Samson Tire & Rubber Corporation. (R. 481-490; 506-8.)

The foregoing proposals were carried into effect. The new Delaware company was organized under the name of The Samson Corporation. A large majority of the common stockholders of the Samson Tire & Rubber Corporation promptly signified their willingness to exchange their common shares of the Samson Tire & Rubber Corporation for the preferred and the Class B common shares of The Samson Corporation and such exchange was carried out. A substantial minority of the common stock-

holders of the Samson Tire & Rubber Corporation, however, never did make the exchange of their common shares and continued to remain common stockholders of the Samson Tire & Rubber Corporation. (R. 185.)

The Samson Tire & Rubber Corporation continued the operation of its business. It commenced and continued to manufacture in large volume tires and tubes of the brands of the United States Rubber Company which the Samson Tire & Rubber Corporation shipped on a consignment basis to the United States Rubber Products, Incorporated, a subsidiary of the United States Rubber Company, which operated a large number of branches or stores throughout the Pacific Coast area from which it supplied the trade with tires and tubes of brands of the United States Rubber Company.

On December 31, 1929, the Samson Tire & Rubber Corporation owned assets in the total value of $5,134,-041.13. (R. 357-8.) These assets included land, buildings, machinery, equipment, inventories of raw materials and finished goods, supplies, intangibles and cash. All of these assets were the result of the business operations of the Samson Tire & Rubber Corporation and had been accumulated by it in the course of those operations since 1917. On December 31, 1931, the Samson Tire & Rubber Corporation owned assets in the total value of $5,433,-874.72, of which $1,566,119.86 was the equity of its common stockholders. (R. 364-6.) On May 31, 1932, the Samson Tire & Rubber Corporation owned assets in the total value of $5,364,801.04, of which $1,499,902.38

was the equity of its common stockholders. (R. 368-9.) The Samson Tire & Rubber Corporation always carried its own bank accounts and employed its own labor and paid that labor itself. It maintained its own complete set of books and business records, including ledgers and other operating books, covering and reflecting the conduct of its business, like any other large concern. Included in these books and records were asset and liability accounts, pay roll accounts, accounts receivable, accounts payable, cost accounts and inventory accounts. It always rendered its own separate income tax returns. (R. 261-2; 268; 269-272.)

It was this old (actually dating from 1917, while reorganized in 1928), substantial, property-owning, integrated business concern which the Collector of Internal Revenue denied the right to sell its own corporately owned merchandise on June 1, 1932, and whose corporate entity in that connection the Collector disregarded and held for naught.

On May 31, 1932, the Samson Tire & Rubber Corporation owned in its own right a stock of tires and tubes. By adequate and complete bill of sale dated June 1, 1932, it sold that stock outright to the United States Rubber Products, Incorporated, together with all tires and tubes which the vendor might manufacture or acquire from day to day commencing on June 1, 1932, and continuing thereafter until terminated by either party on thirty days' written notice. There were expressly excluded from this bill of sale tires and tubes which the Samson Tire & Rubber

Corporation previously had specifically sold or contracted to sell to customers other than the United States Rubber Products, Incorporated. While the Samson Tire & Rubber Corporation sold a substantial part of its production directly to other dealers and customers, such as the Western Auto Supply Company, a large chain store distributor of automobile accessories and supplies and other merchandise on the Pacific Coast, which always was Samson's own customer, the larger part of its production after 1930 was taken and distributed by the United States Rubber Products, Incorporated. (R. 237-8; 331; 353.)

During 1932 and 1933 the Samson Tire & Rubber Corporation manufactured tires and tubes of *special* brands in the amount of $3,190,742.00. (R. 572.) These were for Western Auto Supply, Montgomery-Ward and Atlas (R. 573), all on the Pacific Coast, and there is no reason to surmise that less than substantially one-third of that amount was business received from Western Auto Supply.

The transfer of tires and tubes made by the bill of sale of June 1, 1932, was regularly entered by the Samson Tire & Rubber Corporation upon its books and records, as a sale properly and usually would be. A complete set of invoices was made in duplicate of which the original set was sent to the United States Rubber Products, Incorporated, at New York and the duplicate set was retained by the Samson Tire & Rubber Corporation at Los Angeles. Accounts receivable were opened on the ledger of the Samson Tire & Rubber Corporation against the United States Rubber Products, Incorporated, in which

accounts the United States Rubber Products, Incorporated, was debited with the full amount of the sale price. At the same time appropriate corresponding entries were made in other accounts on the ledger, such as sales accounts, inventory accounts and cost of sales account. No element of a complete sale was lacking. (R. 272-278; 234-35.) After the bill of sale the Samson Tire & Rubber Corporation exercised no control whatever over the goods, that control passed completely to the vendee. (R. 284.)

The final execution of the bill of sale was in California (Los Angeles) where Samson's plant and offices were located. (R. 14; 457.)

The Samson Corporation (the new company organized in Delaware in December, 1930) never had any assets other than (1) the shares of common stock of the Samson Tire & Rubber Corporation which The Samson Corporation had acquired by the exchange of its own preferred and Class B common shares with the common stockholders of the Samson Tire & Rubber Corporation and (2) the shares of preferred stock (approximately 60,000 shares) of the Samson Tire & Rubber Corporation which The Samson Corporation had purchased for cash. (R. 459.) So obviously the former common stockholders of the Samson Tire & Rubber Corporation who had exchanged their common shares of that corporation for preferred and Class B common shares of The Samson Corporation were dependent for the recovery of their investment solely upon the business success, welfare and solvency of the Samson Tire & Rubber Corporation itself. They thus

still were virtual shareholders of the Samson Tire & Rubber Corporation.

On June 1, 1932, the investment of the independent public in the assets, welfare and earnings of the Samson Tire & Rubber Corporation, which were the sole recourse of those investors, amounted to the following millions:

$57,690.00 in non-convertible preferred stock of the par value (R. 112) of $10.00 per share;

$710.00 in convertible preferred stock of the par value (R. 112) of $10.00 per share;

$45,150.00 in 4515 shares of no par (R. 112) common stock (see R. 358, last line, and R. 369, next to last line reading "Net Worth of Common Stock $1,499,902.38");

$1,417,850.00 representing the public's investment by various persons in 141,785 preferred shares of The Samson Corporation of the par value (R. 207) of $10.00 per share;

(For above stockholdings, see R. 43.)

$810,500.00 principal of debentures outstanding payable only out of earnings and assets of Samson Tire & Rubber Corporation. (R. 185.)

$2,331,900.00 total investment of investing public.

ARGUMENT.

In the petition (p. 7) it is said that "the taxpayer *remained* the *owner*". If *it* (Samson Tire & Rubber Corporation) was the *owner* why could it not sell its *own* property, in a transaction advantageous to it? The only ground alleged for refusing to recognize the sale was that the *vendor* (taxpayer) was so insubstantial that its corporate entity must be brushed aside and its corporate acts held for naught. How could that be if *it* owned the merchandise? Just as it owned the merchandise, so Samson Tire & Rubber Corporation owned in its own right land, buildings, machinery, equipment, raw materials, finished goods, bank and other accounts, which were the sole security and reliance of over two million dollars of public investment. None of that property could be sold or disposed of without the affirmative action and agreement of the Samson Tire & Rubber Corporation itself. And by the same token it could itself sell and give good title to any of said property and merchandise. It was bound, as was also its largest stockholder, to see that its affairs were so conducted that its business was profitable and its assets were conserved, for the benfit of itself and its debenture holders and *all* of its shareholders.

This case is as different as white from black from all of the cases cited at any time in the course of this litigation by the party now petitioner. Constantly we have challenged our opponent to cite a case within the facts at bar, and to this date he has failed to do so.

All of opponent's citations have been and still are of cases wherein a transfer was disregarded and held for naught because the *vendee* was a wholly owned creature of the vendor, organized and existing wholly for the convenience of the vendor and subject wholly to the vendor's whim and caprice, often, also, just organized for the purpose of the transfer, and sometimes then promptly dissolved as in *Gregory v. Helvering*, 293 U. S. 465, cited by the petitioner in the court below. None of these insubstantial corporate vendees involved any outside or public investment interest.

The instant case cannot even by Procrustean violence be tortured to conform to the cases cited by the petitioner. In those cases the transfer was rejected because of the incompetence of the vendee, and so the merchandise remained the property of the vendor who therefore, in excise tax cases, became liable for the tax when the merchandise later was sold to the public. Curiously, at bar, the Collector first ignores the corporate entity of the vendor in order to get rid, as he believes, of the sale and then having, as he thinks, gotten rid of the sale he proceeds to tax the vendor now as the substantial producer and owner of the merchandise.

We do not need to analyze the *Continental Oil* case or the *Griffiths* case or the *Higgins* case, the citations upon which the petitioner relies, further than to say that in the *Higgins* case there was only *one* real person involved who was the sole owner of a corporation and used that corporation for the purpose of making sales by which losses could be ascertained and deducted whenever the conditions

made it advantageous for the taxpayer to pursue that course; that in the *Griffiths* case there was only *one* real person involved who wholly owned and solely controlled a corporation which he caused *at the time* to be organized for the purpose of effecting a transfer of stock from himself to the corporation which then would transfer the stock to a third party for $100,000, which sum the corporation then would pay to the taxpayer in forty annual instalments, the plan being thus to invoke the provision of the income tax act permitting the income tax to be spread over the period of credit where a purchase price was made payable in annual instalments; that in the *Continental Oil* case both vendees were wholly owned and solely controlled subsidiary corporations of Continental Oil Company which could exercise its will over each subsidiary without accountability to any interest whatever other than its own—each subsidiary corporation was a true instance of a mere department or pocket of a parent corporation.

The petitioner definitely is in error in assuming that in any of these cited cases there were "*minority* stockholders * * * involved". (P. pg. 8.)

The June 1st bill of sale was for a substantial consideration, cost plus five per cent, a fixed price payable in any event, notwithstanding market fluctuations in a highly competitive industry, or advancing costs, by a financially responsible vendee. That vendee, in turn, obtained an inventory which, in competition with other distributors, it could sell to the public without the addition of any excise tax. Distributors all over the country were like-

wise protecting themselves. (R. 98.) The manufacturing owner also had a perfect legal right, in addition to other advantages, to protect its financial position for its stockholders and creditors by effecting a tax saving by any regular, open and frank method of merchandising. It acted no differently from innumerable other manufacturers throughout the country. (R. 98.) Its good faith cannot be impugned and there was no fraud or deception involved in its action, and such was not pleaded (R. 27-8), or claimed at the trial. (R. 574.)

There was no reason in law or equity why the Samson Tire & Rubber Corporation should not make an absolute sale of these particular inventories of tires and tubes, even if previously and subsequently it disposed of other stocks of tires and tubes through consignment to the United States Rubber Products, Incorporated, which subjected the vendor (Samson Tire & Rubber Corporation) to all of the caprices of the market in this highly competitive industry.

The Samson Tire & Rubber Corporation retained no control or right to do as it pleased over the goods sold—no control over the disposal, by sale, consignment or otherwise, to dealers or others. Such control and right passed exclusively to the vendee United States Rubber Products, Incorporated. (R. 284.) With the array of findings of evidentiary or probative facts and details as drafted by the defendant in the trial court there is no finding whatever that the vendor did not divest itself completely of all control over the goods sold.

With respect to the Samson Tire & Rubber Corporation itself, the United States Rubber Company as the owner (through subsidiaries) of a majority of the voting stock could not do as it pleased, but was a fiduciary and trustee for the large interests held by independent stockholders and creditors of the Samson Tire & Rubber Corporation. (*Pepper v. Litton,* 308 U. S. 295, at page 306.)

In the cases cited by the petitioner the finding that there was no "business purpose" was founded on the fact that in each of those cases the property continued in the complete control of the vendor through the fact that the vendee was wholly owned and solely controlled by the vendor. As said in *Higgins v. Smith,* the transaction was "a transfer by Mr. Smith's left hand, being his individual hand, into his right hand, being his corporate hand, so that in truth and fact there was no transfer at all". It was on such ground that the court in the *Higgins* case said that the government might look at the actualities and disregard the sale transaction as unreal or a sham. Obviously a sale transaction could not be held to be "unreal or a sham" merely because it operated as a tax saving to the vendor, even if that saving was the primary reason for the vendor's making that sale. At bar, as previously mentioned, no control remained in the vendor Samson Tire & Rubber Corporation.

The respondent has not sought any right or privilege granted by the excise tax act. It has not claimed to have brought itself within any favored class defined by any clause of that act, as the taxpayer in the *Higgins* and the

Griffiths cases did in respect of provisions of the income tax act. In no respect does the respondent invoke the excise tax act.

The respondent never has asked the court to piece-out the sale transaction or to supply elements lacking or to resolve doubts by presumptions in the taxpayer's favor. The steps taken by the respondent were full and sufficient to consummate a sale. All the respondent asks is that its consummated acts shall be given the legal effect to which such acts ordinarily are entitled, that they shall be given their common law effect. In this respect it should be remembered that this sale was made before the effective date of the excise tax act, and when the only law applicable was the common law with the statutes and judicial decisions of California. The law of California was fully complied with, it and the applicable California appellate decisions sustain the sale, as the Circuit Court has declared, properly so as we respectfully submit.

Respectfully we submit that the petition for a writ of certiorari should be denied.

PAUL H. ARTHUR,
of New York,
Rockefeller Center, 1230 6th Ave., New York,
Attorney for Respondent.

Of Counsel:

ERNEST S. WILLIAMS,
of Los Angeles.